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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1042

JASPER C. GOULD and OPAL W. GOULD, his wife,
Petitioners,

vs.

AMERICAN WATER WORKS SERVICE CO., INC., a corporation, and THE BERNARDS WATER COMPANY, a New Jersey Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions Involved	3
Statement of the Case	4
POINT I—The Appellate Division's reversal of the trial court's judgment for the Petitioner and the affirmance of that reversal by the Supreme Court of New Jersey deprived Petitioners of their right to trial by jury as guaranteed by the United States Constitution, Amendment VII, and by the New Jersey Constitution of 1947, Art. 1, par. 9 if that reversal was unreasonable	9
POINT II—The grant of permanent diversionary rights to the Bernards Water Company and the lack of judicial scrutiny of the acts of the Bernards Water Company constituted the taking of private property for public use without just compensation, in contravention of Amendment V of the United States Constitution as applied to the States by Amendment XIV	14
POINT III—Petitioners were denied equal protection of the law as guaranteed by Article I, par. 1, subsec. 1, par. 10, New Jersey Constitution of 1947, and the United States Constitution, Amendment XIV, by the manner by which permanent diversionary rights were granted to the Bernards Water Company and the sustaining of the grant by the New Jersey courts	18

PAGE

POINT IV—The totality of the effect of the New Jersey administrative proceeding and the failure of the New Jersey courts to scrutinize and relieve the impact of it deprived Petitioners of property without due process of law 22

Conclusion 25

APPENDIX A—Opinions of the Supreme Court of New Jersey:

Per Curiam Opinion 1a

First Denial of Petition for Rehearing (No Opinion) 6a

Second Denial of Petition for Rehearing (No Opinion) 7a

APPENDIX B—Opinion of Appellate Division of the Superior Court of New Jersey (Unpublished Opinion 8a

APPENDIX C—Documents of Department of Conservation and Economic Development, Division of Water Policy and Supply, State of New Jersey:

Application for Permit to Drill Well—Filed August 14, 1961 ..... 15a

Approval of Application of Bernards Water Company for diversionary rights—Issued October 29, 1965 ..... 18a

Cases Cited

Application of Hackensack Water Co., 88 N. J. Super. 362, 212 A. 2d 394 (1965) 22

Application of Plainfield-Union Water Co., 11 N. J. 382, 94 A. 2d 673 (1953) 22

PAGE

Borough of Collingswood v. Water Supply Commission, 84 N. J. L. 104, 86 A. 660 (1913), aff. 85 N. J. L. 672, 92 A. 277 (1916) 22

Davis v. Mills, 194 U. S. 451, 48 L. ed. 1067, 24 S. Ct. 692 24

Disbrow v. Durand, 54 N. J. L. 343 (E. & A. 1892) 13

East Coast Lumber Terminal, Inc. v. Babylon (C. A. 2 N. Y.), 174 F. 2d 106, 8 A. L. R. 2d 1219 21

George Benz Sons v. Ericson, 227 Minn. 1, 34 N. W. 2d 725 (1948) 20, 24

Griggs v. County of Allegheny, (1962), 369 U. S. 84, 7 L. ed. 2d 585, 82 S. Ct. 531 .....16, 17

Kulbacki v. Sobchinsky, 38 N. J. 435, 185 A. 2d 835 (1962) 13

Lewis v. Read, 80 N. J. Super. 148, 192 A. 2d 255 (1963) 13

McCoy v. Union Elevator R. Co., (1918), 247 U. S. 354, 62 L. ed. 1156, 38 S. Ct. 505 15

Monmouth Consol. Water Co. v. Baris, 66 N. J. Super. 9, 168 A. 2d 259 (1961) 17, 24

Plainfield-Union Water Co. v. Borough of Mountainside, 14 N. J. 296, 102 A. 2d 1 (1954) 22

Raley v. Ohio (1959), 360 U. S. 423, 79 S. Ct. 1257, 3 L. ed. 2d 1344 9

Shapiro v. Solomon, 42 N. J. Super. 377 (App. Div. 1956) 13

Steffler v. Schroeder, 12 N. J. Super. 243 (App. Div. 1951) 13

U. S. v. Causby (1946), 328 U. S. 256, 90 L. ed. 1206, 66 S. Ct. 1062 16

PAGE

U. S. v. Dickinson (1947), 331 U. S. 745 15

Washington National Insurance Co. v. Board of Review, 1 N. J. 545, 64 A. 2d 443 (1949) 20

West Caldwell v. Caldwell, 26 N. J. 9, 29, 138 A. 2d 402 13

Wright v. Georgia (1963), 373 U. S. 284, 10 L. ed. 2d 349, 83 S .Ct. 1240 21

Constitutions Cited

U. S. Constitution:

Amendment V 3

Amendment VII 3

Amendment XIV Sec. 1, Clause 2 3

Amendment XIV, Sec. 1, Clause 2 4

Amendment XIV, Sec. 1, Clause 3 3

N. J. Constitution of 1947, Art. 1, Sec. 9 4

N. J. Constitution of 1947, Art. 1, par. 1, subsec. 1, par. 10 ..... 3, 4

N. J. Const. of 1947, Art. 6, Sec. 5, par. 3 10

Statutes Cited

N.J.R.R. 1:5-3(a) 11

N.J.R.R. 4:15-2 13

N.J.S.A. Title 58 Chap. 1 ..... 21, 22

28 U. S. C. Section 1256 (3) 2

Text Cited

1 Williston on Contracts (Jaeger Ed.) Sec. 36 and 37 13

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No.

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AMERICAN WATER WORKS SERVICE CO., INC., a corporation, and THE BERNARDS WATER COMPANY, a New Jersey *Corporation,*

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Jasper C. Gould and Opal W. Gould, His Wife, hereby petition for a writ of certiorari to review the decision of the Supreme Court of the State of New Jersey denying recovery to Petitioners from The Bernards Water Company, a New Jersey Corporation, on the ground that Petitioners were volunteers and as such had not conferred any benefits on The Bernards Water Company as a result of any request on the part of the Company.

Opinions Below

The *Per Curiam* opinion below is reported in 52 N. J. 226, 245 A. 2d 14. It is appended hereto as Appendix A. Appendix B consists of the opinion of the Appellate Division of the Superior Court of New Jersey, which reversed a judgment of the Law Division of the Superior Court of New Jersey based on a jury verdict awarding damages to Petitioners in the amount of $12,345.00.

Jurisdiction

The order sought to be reviewed was made and entered on June 28, 1968 in the form of Judgment and Mandate on Affirmance. On July 8, 1968, Petitioners filed a timely motion for rehearing, which was denied on September 17, 1968 without an opinion because no Justice who voted with the majority had moved for a reconsideration. On September 25, 1968, Petitioners filed a Second Petition for Rehearing, which was supplemented by a further writing characterized as a Petition dated October 28, 1968. This Second Petition for Rehearing was denied on November 18, 1968 without an opinion because no Justice who voted with the majority had moved for a reconsideration. Although no reasons other than the one stated above were given for the denial of the Second Petition for Rehearing, inquiry of the Clerk of the Supreme Court of New Jersey developed the fact that the decision with respect to the Second Petition for Rehearing was based on the merits of the arguments as set forth therein. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U. S. C. Sec. 1256(3).

Questions Presented for Review

1. Whether the appellate tribunals of a state may reverse a jury verdict and judgment of a trial court without taking into account the basic fact questions decided and

by thus failing to consider these decisions of fact in effect deprive a party of his right to trial by jury as guaranteed by the United States Constitution and the New Jersey Constitution of 1947.

2. Whether the grant of permanent diversionary rights and the lack of judicial scrutiny of the acts of the Bernards Water Company constituted a "taking" of private property contrary to the provisions of Amendment V and Amendment XIV of the United States Constitution.

3. Whether Petitioners were denied equal protection of the laws as guaranteed by Article I, par. 1, subsec. 1, par. 10, New Jersey Constitution of 1947, and Amendment XIV of the United States Constitution by the manner by which permanent diversionary rights were granted to the Bernards Water Company and the sustaining of the grant by the New Jersey courts.

4. Whether the totality of the effect of the New Jersey administrative proceeding and the failure of the New Jersey courts to scrutinize and relieve the impact of it deprived Petitioners of proprety without due process of law.

Constitutional Provisions Involved

Amendment V, United States Constitution: "* * * nor shall private property be taken for public use, without just compensation."

Amendment VII, United States Constitution: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the common law."

Amendment XIV, United States Constitution, Sec. 1, Clause 3: "No State shall * * * nor shall any State de-

prive * * * nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment XIV, United States Constitution, Sec. 1, Clause 2: "* * * nor shall any State deprive any person of * * * property, without due process of law * * *"

New Jersey Constitution of 1947, Art. 1. Sec. 9: "The right of trial by jury shall remain inviolate: * * *"

New Jersey Constitution of 1947, Art. 1, par. 1, subsec. 1, par. 10: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." (Note: Subsec. 1, par. 31-70, of this same Art. 1, par. 1, covers due process.)

Statement of the Case

Petitioners, Jasper C. Gould and Opal W. Gould (hereinafter referred to as "Gould"), own a parcel of property in Somerset County, New Jersey. Gould has been a well driller for over 18 years (JA18a-12 to 17). Petitioner was an acquaintance of one Harold Burd, superintendent of Bernards Water Company, the Respondent, and on one occasion Burd asked Petitioner to meet with the Company's geologist and acquaint him with wells which Gould had drilled. Gould showed the geologist locations where he had drilled, how much overburden was on top of the basic rock, and the yield per minute of the wells in the area (JA24a-10-21). No wells had been drilled on Gould's property at this time (JA26a-8-9).

On a later occasion, Burd, when questioned by Gould, told him that the company would be willing to pay a fair price for a water source yielding 200 gallons a minute (JA24a-5-JA26a-6, JA249a-11-18). Thereafter, in late 1953

or early 1954, Gould began drilling on his own property. The first well did not meet his expectations, but the second drilling produced a well that yielded water in excess of the company's minimum requirement of 200 gallons per minute, as stated by Burd (JA29a-24-JA31a-18).

Gould then told Burd that he thought he had a good well (JA31a-19-JA32a-4). Burd reported to his company, his superiors—including Greco, the president—that Gould might have a good well. Burd's superiors told him to ask Gould for a pump test (JA32a-6-9). As a result, Gould and Burd together began the test pumping on April 20, 1954, and this continued for 36 hours, during which time either Burd or his assistant was continuously present (JA32a-25-JA35a-10). Gould expended $500.00 of his own funds to obtain machinery to carry out these pump tests (JA45a-19-24).

When the test pumping revealed a satisfactory yield, Burd told Gould that a well of larger diameter was required to accommodate the pumping equipment employed by the water company (JA43a-3-5). Gould reamed the well from a 6 inch diameter to a 10 inch one to meet the company's requirements (JA43a-6-8). Gould expended his money and more than 50 days' work for this purpose (JA43a-6-24).

Burd arranged a conference between his superior, a Mr. Coleman, Gould, and himself, at which time an offer of $12,000.00 was made for the well (JA36a-1-JA37a-19). The Petitioner declined this offer. The parties continued to negotiate for several years, there being offers and counter-offers until 1960 or 1961 (JA37a-20-JA41a-18).

In the meantime, the officers of Bernards Water Company had not been idle. They had leased property adjacent to Gould's property, at a distance of approximately 490 feet from Gould's well. This lease contained an option to buy (JA41a-17-25, JA81a-1-8).

On August 14, 1961, the Bernards Water Company applied to the Department of Conservation & Economic Development, Division of Water Policy and Supply, State of New Jersey, for a permit to dig a well on the then leased property. (See Appendix C.) The application was approved by the issuance of a permit on August 25, 1961. (See Appendix C.)

Drilling began almost simultaneously with the request for the Permit to Drill, and when Gould approached representatives of the Bernards Water Company to obtain an explanation of their activities, they refused to discuss the matter (JA42a-11-23).

Gould placed the company on notice on August 18, 1961 that he regarded their activities as being subject to legal action, and when these activities were continued, a Complaint was filed on February 14, 1963 in the Law Division of the Superior Court of New Jersey. (See Appendix filed with the Appellate Division of the Superior Court of New Jersey, p. 1a.)

After this action was started, the Bernards Water Company on March 10, 1964 filed an application for a grant of diversionary rights with the Department of Conservation and Economic Development, Division of Water Policy and Supply, State of New Jersey. Even though the trial of the Complaint filed on February 14, 1963 had not been held, and even though the pendency of that action was brought to its attention, the Division of Water Policy and Supply began a hearing on the application for a grant of diversionary rights. Gould at first objected to the holding of this hearing, and it was adjourned temporarily, but when Gould withdrew his objections, the hearing was begun on June 15, 1964. (The transcript of the Hearing held on June 15, 1964 is filed with this Petition.) After taking testimony during most of June 15, 1964, the Hearing was adjourned until a later date, and was completed on October 4,

1965. On that date, approximately one year before the trial of the action pending in the Superior Court of New Jersey, Law Division, the Hearing was completed. (The transcript of the Hearing held on October 4, 1965 is filed with this Petition.)

On October 29, 1965, the Department of Conservation and Economic Development, Division of Water Policy and Supply, State of New Jersey, and prior to the trial of the Complaint filed on February 14, 1963, granted the Bernards Water Company permanent diversionary rights of 500,000 gallons daily, which is the equivalent of 15 million gallons per month and 180 million gallons per year, a most valuable grant having promise of an extraordinary amount of profits for the Bernards Water Company, a subsidiary of American Water Works, admittedly "* * * the holding entity for the largest group of corporate owned water companies in the United States. * * *" (See Standard & Poor's Corp. *Standard Listed Stock Reports,* Vol. 35, No. 238, Thursday, December 12, 1968, at page 190.)

The trial of the Complaint filed by Gould on February 14, 1963 was held in the Law Division of the Superior Court of New Jersey on October 3 and 4, 1966. Judgment in favor of Gould in the amount of $12,345.00 was entered in the trial court on October 14, 1966. This judgment was based on a jury verdict in favor of Gould for that amount. The one theory of liability tried in the trial court was that of quasi-contract, that is, contract implied in law. The judgment was against the Bernards Water Company as sole defendant, the Complaint against American Water Works having been dismissed by the trial judge without any opposing argument by counsel for Petitioners Gould (JA246a-47).

After judgment was entered in the trial court, the Bernards Water Company filed their Notice of Appeal on February 10, 1967 (JA13a) and Petitioners filed a cross-ap-

peal on February 20, 1967 as to damages only and as to the trial court's denial of their motion for a new trial as to damages (JA14a).

The Appellate Division of the Superior Court of New Jersey rendered its decision reversing the jury verdict and Judgment of the Law Division of the Superior Court of New Jersey on October 25, 1967 (P1a), and the Mandate on Reversal was entered on November 8, 1967 (P9a).

Petitioners filed their Notice of Petition for Certification on November 13, 1967 (P10a). The Supreme Court of New Jersey granted Certification and the case was argued before the Supreme Court in Trenton, New Jersey. On June 28, 1968, the Supreme Court rendered its decision affirming the Judgment of the Appellate Division of the Superior Court of New Jersey, and the Judgment and Mandate on Affirmance was entered on the same date.

On July 8, 1968, Gould filed a timely Petition for Rehearing, which was denied on September 17, 1968, no opinion being rendered.

On September 25, 1968, Gould filed another Petition for Rehearing, which was supplemented by additional written argument on October 28, 1968. The Supreme Court of New Jersey consented to consider this Second Petition for Rehearing, which was denied on November 18, 1968. No opinion accompanied this denial of the Second Petition for Rehearing because "no Justice who voted with the majority" moved a reconsideration, but inquiry at the Office of the Clerk of the Supreme Court of New Jersey disclosed that the Justices had considered the Second Petition for Rehearing on its merits. Up until the time of the Second Petition for Rehearing, the theory of liability propounded by Petitioners had always been one of quasi-contract, but in the Second Petition a theory of liability based on contract implied in fact was placed before the Justices.

A discussion of how the federal questions involved were brought before the Supreme Court of New Jersey will be discussed next.

1. The federal question as to whether Petitioners were deprived of their right to trial by jury was raised by the New Jersey appellate tribunals themselves when they reversed the jury verdict and the judgment of the trial court. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio,* 1959, 360 U. S. 423, 436, 3 L. ed. 2d 1344, 79 S. Ct. 1257, 1265.

2. The federal question as to the award of diversionary rights was raised inferentially in the trial court when large segments of the testimony taken at the Hearing before the Division of Water Policy and Supply were read into the record (JA136a-JA170a). Also, the position in which each of the parties was placed by the award of diversionary rights was brought to the attention of the Supreme Court of New Jersey in the Petition for Certification which was filed with that body. (See Petition for Certification, pp. 11-14.) Also, in his reply brief, the attorney for the Bernards Water Company discussed the question why the Company had not resorted to condemnation.

POINT I

The Appellate Division's reversal of the trial court's judgment for the Petitioner and the affirmance of that reversal by the Supreme Court of New Jersey deprived Petitioners of their right to trial by jury as guaranteed by the United States Constitution, Amendment VII, and by the New Jersey Constitution 1947, Art. I, par. 9 if that reversal was unreasonable.

A jury verdict in favor of Gould was obtained in the Superior Court of New Jersey, Law Division, and judg-

ment was entered accordingly. The Bernards Water Company made a motion to the trial judge for a new trial, and Petitioners made a motion to the trial judge for a new trial as to damages only. Both motions were denied. Then both parties appealed to the Appellate Division of the Superior Court, Gould as to damages only, and the Bernards Water Company from the whole of the final judgment in favor of Petitioners. Briefs were filed by both parties, and a reply brief by Gould, and there were oral arguments by both parties. The Superior Court, Appellate Division, in an unpublished opinion, reversed the trial court, giving the following reasons:

> "We do not reach the issues posed by the cross-appeal since we conclude from our examination of the record that Bernards' motion for judgment of dismissal should have been granted. We find no basis for permitting plaintiffs a recovery in this cause even though we accept as true, as we must (DeRienzo v. Morristown Airport Corp., 28 *N. J.* 231, 236 (1958)), all the evidence which supports the view of the plaintiffs and give them the benefit of all legitimate inferences which may logically be drawn in their favor."

> "It was, of course, for the jury to determine whether plaintiffs' version of the facts were (sic) true. However, it was not the jury's function to determine whether those facts gave rise to the *quasi*-contractual obligation contended for by plaintiffs. That determination was for the court; it should not have been submitted to the jury."

It is impossible to ascertain from these statements what the Appellate Division was doing. Was it exercising the original jurisdiction which it has under Art. 6, Sec. 5, par. 3 of the New Jersey Constitution 1947, or was it acting

under N. J. R. R. 1:5-3(a)? Or was it exercising the power granted to it under both provisions? And, in the decision of the Supreme Court of New Jersey, which affirms the judgment of the Appellate Division, there is no indication of the power being exercised. In any event, the verdict of the jury was upset on appeal, and the reasoning of both appellate tribunals leaves much to be desired in terms of explicitness, logic and handling of the evidence in terms of basic fact questions. Assuredly, the jury, from the mass of testimony taken in its presence, decided certain basic facts which were never discussed in the decisions of the appellate courts. These are actually the basic fact questions decided:

1. That *but for* Gould's acts, the Bernards Water Company would have had an infinitestimal possibility of developing a water supply at the location of their present well.
2. That Gould did certain acts, and he did those acts because of acts of officers of the Bernards Water Company.

The first point should be considered. The whole thrust of the brief of the Bernards Water Company to the Appellate Division, which was incorporated by reference in its brief to the Supreme Court, was against this point. The following is an example:

> "* * * If the record is studied closely, one finds that plaintiff owned several acres of ground where these wells were drilled; built his home there, and still owned the ground as of the time of this trial. Defendant is not using any of plaintiff's property or his wells, so that it cannot be said to be benefitting in that regard. Any benefit, if one can be found, would be only the knowledge that close by defendant's well plaintiff previously had drilled, produced

> a flow of water in which defendant might be interested. This knowledge was not secret information and could have been obtained by defendant from public records. It could have been obtained by defendant from merely looking at the area and noticing the wells. * * *"

It is submitted that the above is completely incorrect as an argument and a statement of facts. This knowledge was secret information and could not have been obtained by defendant from public records because at the time it was obtained it was not a matter of public record. And how could it have been discovered by merely looking since the area is in the midst of a thick growth of trees. Does the attorney for Bernards Water Company mean that the information could have been obtained by an act of trespass?

The following is another example of the reasoning in defendant's brief:

> "* * * Lastly, defendant did not demand the information of plaintiff."

It is submitted that this is completely beside the point as an argument. Defendant did not demand the information. How could defendant demand it? What did the Bernards Water Company do? The officers of Bernards made a request for a pump test, and when their request was granted, they appointed a trusted employee to spend thirty-six hours with Gould to ascertain if a water supply had been found. And they encouraged and allowed Gould to spend $500.00 of his own money for machinery to carry out the pump test. This leads into the second point decided by the jury, that is, that Gould did certain acts, and he did those acts because of acts of officers of Bernards Water Company. It is elementary contract law that these acts of Gould were done in return for the implied promise of the

Bernards Water Company that they would be bound if it was ascertained that a suitable water supply should be found. See *Disbrow* v. *Durand,* 54 N. J. L. 343 (E. & A. 1892); *Steffler* v. *Schroeder,* 12 N. J. Super. 243, 247 (App. Div. 1951); *Shapiro* v. *Solomon,* 42 N. J. Super. 377, 383 (App. Div. 1951); *West Caldwell* v. *Caldwell,* 26 N. J. 9, 29, 138 A. 2d 402; 1 Williston on *Contracts* (Jaeger Ed.), Sec. 36 and 37.

If the two appellate tribunals ever considered any question beyond that of obligation in quasi-contract (contract implied in law), it is certainly not apparent from their decisions. In this connection, it must be asked whether they considered N. J. R. R. 4:15-2, since the record does contain evidence which might support other theories of liability in addition to that of quasi-contract. These will be discussed infra.

If the above is correct, there is a real question here whether or not Gould was denied his right to trial by jury when the appellate tribunals of New Jersey set aside the findings of the trial jury and the judgment of the trial court. Certainly it would appear that the manner in which they exercised the powers granted them by the New Jersey Constitution and the New Jersey Revised Rules deserves the scrutiny of the only other appellate tribunal now open to Gould. With the utmost respect and full and due deference to the appellate tribunals of New Jersey, it must be asked whether the note of caution sounded in *Lewis* v. *Read,* 80 N. J. Super. 148, 192 A. 2d 255, at 268 (1963) was exercised in this case. See also *Kulbacki* v. *Sobchinsky,* 185 A. 2d 835, 38 N. J. 435.

On the two occasions when the Supreme Court of New Jersey denied Gould's Petitions for Rehearing, no opinions accompanied the denials.

POINT II

The grant of permanent diversionary rights to the Bernards Water Company and the lack of judicial scrutiny of the acts of the Bernards Water Company constituted the taking of private property for public use without just compensation, in contravention of Amendment V of the United States Constitution as applied to the States by Amendment XIV.

As set forth in the statement of the case, the Bernards Water Company applied for permanent diversionary rights on March 10, 1964, and after a hearing held on two different dates, on October 29, 1965 was granted permanent diversionary rights of a half million gallons daily. There is a strong possibility that this present grant of a half million gallons daily will be increased to a million gallons daily at some date in the near future. This means that the Bernards Water Company could eventually have diversionary rights of 360 million gallons per year, and over a period of twenty-five years the profit on these diversionary rights will undoubtedly be well over a million dollars.

First, it is important to consider who was the actual beneficiary of these permanent diversionary rights. The profit will be made by the Bernards Water Company, but the Company stands in the place of the Borough of Bernardsville, where the water will be used by the public. And behind both the Company and the Borough is the parent public utility, American Water Works, a multi-state holding company. Be that as it may, it is not debatable that if there was a taking, it was for public use.

The thing of value, the property, that was taken was the water supply which Gould had discovered and developed. He was a victim of a two-pronged attack. First, the Bernards Water Company beguiled him into revealing to them by means of a pump test whether he had discovered a com-

mercial water supply. Then the Department of Water Policy and Supply granted the permanent diversionary rights to the Bernards Water Company after the Company had dug its own well on property purchased by exercising an option on property leased shortly before they began drilling. As a result, Gould is unable to sell the water he discovered to the Bernards Water Company, and, in addition, the possibility of his obtaining diversionary rights from the Department of Water Policy and Supply so that he can sell to another municipality—in this case the only other one is the Town of Morristown—is almost nil because Morristown would prefer to buy from Bernards Water Company instead of Gould to avoid a great amount of litigation. Moreover, he has to stand by and see Bernards Water Company sell at a profit the water he discovered.

If the Department of Water Policy and Supply had not granted the permanent diversionary rights to the Bernards Water Company, then it is beyond question that the well dug by them would be useless and of no value. But the grant of such diversionary rights by the Department of Water Policy and Supply has made this well of immense value. Certainly it is arguable that this is in violation of the constitutional prohibition against taking private property for public use without just compensation.

In *McCoy* v. *Union Elev. R. Co.*, 247 U. S. 354, 62 L. ed. 1156, 38 S. Ct. 504, the Court stated the following:

> "The fundamental right guaranteed by the Fourteenth Amendment is that the state shall not deprive the owner of the market value of his property under a rule of law which makes it impossible for him to obtain just compensation."

In *U. S.* v. *Dickinson*, 331 U. S. 745, the Court said at page 748:

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."

The two cases to which this case seems most closely analagous are the two airspace cases, *U. S.* v. *Causby* (1946), 328 U. S. 256, 90 L. ed. 1206, 66 S. Ct. 1062, and *Griggs* v. *County of Allegheny* (1962), 369 U. S. 84, 7 L. ed. 2d 585, 82 S. Ct. 531. In *Causby*, the owner of a farm used for raising chickens was deprived of the use of his farm because of the racket made by airplanes passing overhead. In *Griggs*, a party owning a dwelling near a municipal airport was driven from his home by the terribly disturbing effect of planes landing and leaving the airport. In both of these cases, the question was whether the defendant had taken an air easement over the plaintiffs' property for which it had to pay just compensation as required by the Fourteenth Amendment. In both cases the Supreme Court decided in the affirmative. In this case, the question is whether the Bernards Water Company, with the assistance of a power granted to an administrative agency of the State of New Jersey, has taken an easement on the future water supply discovered by Gould, and it appears that this should be answered in the affirmative since both wells are supplied by the same underground source, as was stipulated in the trial record (JA246a-8-12).

If the Bernards Water Company had come onto the property of Gould and had taken the water, admittedly they would have deprived him of a property right and would have been held liable. Can they, by obtaining water by drawing it off underground, avoid liabilty for a "taking".

In the *Griggs* case, *supra,* Justice Douglas asked the following question:

> "A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned?"

Why can it not be argued successfully that the Bernards Water Company has an easement with respect to the water supply discovered and developed by Gould that has been approved and sanctioned by the State of New Jersey? And why should the Bernards Water Company be in a more favorable position so far as the Fourteenth Amendment is cerned?

The power of condemnation has been made available to water companies such as the Bernards Water Company. *Monmouth Consol. Water Co.* v. *Baris,* 66 N. J. Super. 9, 168 A. 2d 259 (1961). The Company refused to use this constitutional method of obtaining access to the water supply discovered and developed by Gould, preferring to take its chances on a different and, at least to some persons, a less approved method. And the Division of Water Policy and Supply failed to hold the Company to the requirement of a condemnation proceeding before granting the permanent diversionary rights.

POINT III

Petitioners were denied equal protection of the laws as guaranteed by Article I, par. 1, subsec. 1, par. 10, New Jersey Constitution of 1947, and the United States Constitution, Amendment XIV, by the manner by which permanent diversionary rights were granted to the Bernards Water Company and the sustaining of the grant by the New Jersey courts.

As set forth in the statement of the case, the Bernards Water Company applied for permanent diversionary rights on March 10, 1964 and, after a hearing held on two different dates, on October 29, 1965 was granted diversionary rights of a half million gallons daily. At the hearing, there was objection by one party who had a relatively shallow well for home use, and an objection by Gould, who had discovered and developed a well which was suitable for commercial use and which was worth a very considerable amount of money in an area which suffers from a lack of water. In connection with his objection, Gould called the attention of the hearing officers to the pending litigation with Bernards Water Company.

The Commissioners of the Division of Water Policy and Supply, who conducted the hearing and decided the question whether or not to grant diversionary rights, took cognizance of the objection of the party having the well for home use, a Mr. and Mrs. Cyril Murphy, but ignored the objection of Gould. (See *Approval of Application of Bernards Water Company, Water Supply Application No. 1183,* par. 14.) Thus the Commissioners excluded Gould from the class of persons entitled to receive the protection of the Division of Water Policy and Supply, and this was done even though the record showed that the well of Bernards Water Company was supplied by the same under-

ground source that supplied Gould's well. In paragraph 2 of *Approval of Application of Bernards Water Company*, supra, there is the following statement after the usual clauses about examination of plans:

> "* * * and that such plans are just and equitable to the other municipalities and civil divisions of the State affected thereby and to the inhabitants thereof."

There is a serious question whether this statement is correct within the intendment of N.J.S.A. Title 58, Chap. 1. Certainly little if any effort was made by the Commissioners of the Division of Water Policy and Supply to consider the position in which Gould was placed by their grant of diversionary rights.

There appears to be a strong possibility that the Division of Water Policy and Supply singled out Bernards Water Company for special favor and discriminated against Gould by granting the diversionary rights. If it be conceded that Bernards Water Company and Gould were two members of a class, that is, parties with a supply of water available for commercial use which was obtained from the same source, then it would appear that Gould was discriminated against. By granting diversionary rights to Bernards Water Company, the Division almost certainly eliminated the possibility that Gould will ever be granted diversionary rights by the Division or, at best, insured that such diversionary rights can be obtained only after long and expensive litigation. At the same time, the Division made it possible for Bernards Water Company to obtain an increase in the amount of diversionary rights granted at some time in the future, which will in turn enable Bernards Water Company to sell water at a large profit to the Town of Morristown, whose franchise area is about one-half mile from the wells of the Bernards Water Company and Gould.

It is necessary to bear in mind that Gould's well was drilled before the well of Bernards Water Company, and that *but for* Gould's well, the chances of Bernards Water Company discovering and developing a water supply in this area would have been infinitesimal. Nevertheless, the Division of Water Policy and Supply found a difference between Bernards Water Company and Gould and favored Bernards Water Company and discriminated against Gould. What is the ground of difference which the Division of Water Policy and Supply found to enable the Division to give to one and to exclude the other. What is the ground of difference which violated the principle that all persons similarly circumstanced shall be treated alike. It could not have been the present need of the Bernards Water Company since admittedly the new source of water was required only for projected needs in the 1970's (JA168a-6-JA169a-7). The federal and state constitutional provisions in question forbid a legislature from selecting any person, natural or artificial, and imposing discrimination, either favorable or unfavorable, upon that person which is not also cast upon others similarly situated. The essential requirements as to classification must be that it shall not be capricious or arbitrary, and that it must be reasonable and natural, and that it must have a rational basis. The cases are replete with admonitions to this effect and with warnings that these constitutional limitations safeguard the fundamental right of persons and of property against arbitrary and oppressive state actions. See *Washington National Insurance Co.* v. *Board of Review,* 1 N. J 545, 552, 64 A. 2d 443 (1949) and *George Benz Sons* v. *Ericson,* 227 Minn. 1, 34 N. W 2d 725 (1948) The only ground of difference here was that one party was a subsidiary of a multi-state public utility functioning in the place of a municipal water department and the other party was an individual who had prospected for and discovered and developed a water supply. The similarity was that both

parties had an available water supply for commercial use. Does the difference outweigh the similarity?

The purpose of N. J. S. A. Title 58, Chap. 1 was to enable the State of New Jersey to develop and conserve the water resources of the State, and there appears no basis for an argument that the statute was unconstitutional on its face. However, there appears to be a basis for an argument that this statute has been administered in a manner that causes discrimination to arise, and that this discrimination denies to Gould the equality of rights before the law which he is guaranteed. If this is the case, then this statute, though not objectionable on its face, may be adjudged unconstitutional because of its effect in operation. See *East Coast Lumber Terminal, Inc.* v. *Babylon* (C. A. 2 N. Y.), 174 F. 2d 106, 8 A. L. R. 2d 1219 and *Wright* v. *Georgia* (1963), 373 U. S. 284, 10 L. ed. 2d 349, 83 S. Ct. 1240.

The questions discussed herein were before the trial court by implication because large parts of the hearings before the Division of Water Policy and Supply were read into the record of the trial (JA246a-16-JA247a-8). The disadvantages accruing to Gould because of the act of the Division of Water Policy and Supply were discussed explicitly in the Petition for Certification to the Supreme Court of New Jersey (Pet. for Cert. to N. J. Sup. Ct., pp. 11-14). It must be assumed that the Supreme Court of New Jersey was cognizant of these questions when certification was granted and could have widened its scrutiny of this case to include a study of the constitutional questions involved. Instead, if its decision is a guide, the Supreme Court chose to limit its review to the sole question whether there was a basis for recovery in quasi-contract.

POINT IV

The totality of the effect of the New Jersey administrative proceeding and the failure of the New Jersey courts to scrutinize and relieve the impact of it deprived Petitioners of property without due process of law.

Title 58, Chap. 1, New Jersey Statutes Annotated, constitutes the Department of Conservation & Economic Development the custodian of the State's water supply. *Borough of Collingswood* v. *Water Supply Commission,* 84 N. J. L. 104, 86 A. 660 (1913), aff. 85 N. J. L. 672, 90 A. 277 (1916). Within the Department, the Division of Water Policy and Supply administers the statute, the main part of which is N. J. S. A., Title 58, Chap. 1. Decisions of the Division will not be set aside by a reviewing court if they are supported by substantial evidence in the record, and only when a determination of the agency so departs from the record as to become arbitrary, capricious or unreasonable will a reviewing court make its own evaluation. *Application of Hackensack Water Co.,* 88 N. J. Super. 362, 212 A. 2d 394 (1965).

The Division of Water Policy and Supply is required to make findings of fact to support its decisions. "The requirement of findings insures against arbitrary action and acts ultra vires; * * *" and, again, "* * * the findings must reveal the basis of the discretionary administrative determination." See *Application of Plainfield-Union Water Co.,* 11 N. J. 382, 94 A. 2d 673 (1953). And, finally, but very significant, there is the following test set forth in *Plainfield-Union Water Co.* v. *Borough of Mountainside,* 14 N. J. 296, 102 A. 2d 1 (1954):

> "* * * And, as the Council also found, it is clear that the planned diversion will be 'just and equita-

> ble' to all other municipalities and civil divisions of the State thereby affected; it will not 'unduly injure public or private interests.'"

Petitioner Gould had notice of the hearings of the Division of Water Policy and Supply, and he attended the hearing and was given an opportunity to be heard, his attorney being present and permitted to cross-examine on the second day of the hearing. At this time, the Commissioners were apprised of the fact that there was litigation pending between Gould and the Bernards Water Company. One of the Commissioners, Schultes, who tended to dominate the hearing, expressed an attitude of disdain and unconcern about the litigation. (See *Hearing before Division of Water Policy and Supply,* October 25, 1965, pp. 92-97). Also, the record referred to indicates that there was little, if any, concern on the part of the Commissioners with respect to the question whether Gould's interests would be injured by a grant of diversionary rights to the Bernards Water Company. Finally, the record shows that there was no awareness on the part of the Commissioners that there might be a question of favoring the Bernards Water Company and discriminating against Gould if diversionary rights should be granted the Bernards Water Company. Apart from fulfilling the requirements of notice and an opportunity to be heard, the record indicates that the hearings left much to be desired because at least one of the Commissioners apparently had already decided that the diversionary rights should be granted.

The *Approval of Application of Bernards Water Company, Water Supply Application No. 1183,* which was approved on October 29, 1965, bears careful study. If it is supported by any findings of fact, they are not included in the document itself, and there is no way of ascertaining what the findings of fact might be if there are any. Moreover, while there is mention of the interest of Mr. and Mrs.

Cyril Murphy, who had a well for home use of water, there is no mention whatsoever of the interest of Petitioner Gould, who had a well for commercial use and who was the discoverer and developer of the water supply in question. This inescapably raises the question whether the Division of Water Policy and Supply acted in such an arbitrary and capricious manner as to deprive Petitioner Gould of a valuable property right without due process of law.

Also, the decision of the Division of Water Policy and Supply contains no indication whether or not the question of condemnation of Gould's property by the Bernards Water Company was considered as a possibility prior to the Division's action with respect to the application for diversionary rights. Yet it is a fact that the power of condemnation has been made available to water companies such as the Bernards Water Company. See *Monmouth Consol. Water Co.* v. *Baris,* 66 N. J. Super. 9, 168 A. 2d 239 (1961).

The Constitution is "intended to preserve practical and substantive rights, not to maintain theories." See *Davis* v. *Mills,* 194 U. S. 451, 457, 48 L. ed. 1067, 1071, 24 S. Ct. 692. The separate clauses of the Fourteenth Amendment guaranteeing due process of law and equal protection of the laws refer to separate rights, the purpose being to require equal protection as well as due process. *George Benz Sons* v. *Erickson,* 227 Minn. 1, 34 N. W. 2d 725 (1948). But to deny equal protection is to deprive without due process. Here Petitioner Gould was excluded from a class eligible for diversionary rights by the Division of Water Policy and Supply. This was done by ignoring his objection as a party with a commercial supply of water and also by ignoring his notice of pending litigation. This put him in a position different from the Bernards Water Company both before the Division of Water Policy and Supply and, as the effect of this, before the appellate tribunals of New Jersey.

This also put the New Jersey Supreme Court in a position where, if it held for Gould, it would require the Bernards Water Company to pay for water which the Division of Water Policy and Supply had granted to the Bernards Water Company.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed for the following reasons:

1. Unquestionably, Petitioner Gould has been deprived of a very valuable property right, and this has taken place in such a manner that the combination of circumstances should move this Court to grant him relief if that is at all possible.

2. Petitioner Gould has no other remedies in the Courts of New Jersey, and with the utmost deference to those Courts, it must be asked whether he should be allowed to remain helpless in the face of what is at least morally an injustice.

Respectfully submitted,

HERMAN A. LINGERMAN
Counsel for Petitioner
68 Main Street
Madison, N. J. 07940

MARTIN L. BUSH
On the Brief

APPENDIX A

Per Curiam Opinion of the Supreme Court of New Jersey, A-131, September Term 1967

Argued May 6, 1968. Decided June 28, 1968.

On appeal from the Superior Court, Appellate Division.

Mr. Burtis W. Horner argued the cause for appellants (Messrs. Stryker, Tams & Dill, attorneys).

Mr. Sidney P. McCord, Jr. argued the cause for respondent The Bernards Water Company (Messrs. McCord, Farrell, Eynon & Munyon, attorneys).

The opinion of the Court was delivered
Per Curiam.

The issue here is whether plaintiff, Jasper C. Gould, has a cause of action for damages against defendant The Bernards Water Company in *quasi* or implied contract based upon alleged unjust enrichment resulting from defendant's appropriation and use of information developed through plaintiff's efforts and skill in locating underground water wells. The trial court decided that the evidence created a jury question on the subject and the jury found for plaintiff Jasper Gould. The complaint against defendant American Water Works Service Co., Inc. was dismissed and has not been appealed. The Appellate Division, in an unreported opinion, reversed, holding that plaintiff was a mere volunteer and that no legal basis existed for imposing a *quasi*-contractual liability on defendant. We granted certification. 51 *N. J.* 182 (1968).

Plaintiff Jasper C. Gould is an experienced well digger. Defendant is a public utility engaged in the business of

selling water to the public in Bernards Township and other localities. In 1953 plaintiff learned from a friend of many years standing, one Burd, who was in defendant's employ as a superintendent, that the company was interested in developing an additional water supply. Upon Gould's inquiry, Burd indicated the company's interest was in wells which would yield 200 to 225 gallons of water a minute. Gould asked also what the company would be willing to pay for such a well. Burd replied he was not the "boss" but he knew it would pay a fair price. Nothing further was said. The friendship between Gould and Burd was purely social. They had had no business relationships. Some time later Burd asked Gould if he would be gracious enough to talk with defendant's geologist. Gould agreed and spent two days with the geologist showing him wells Gould had dug on his own property and discussing conditions he encountered in doing so.

Thereafter, in the latter part of 1953 or early 1954, Gould spent some time drilling a well on five acres of land he owned in Bernards Township. At a depth of 365 feet the well delivered only 60 gallons a minute, so he abandoned it. He moved his equipment 80 feet farther in on his property and began to drill again. This time, after going down 670 feet, he located water and the well yielded over 200 gallons per minute. A short time later, at a social gathering, Gould told Burd he had a very good well and inquired as to whether the company would be interested in seeing a pump test on it. Burd he said would find out from his superiors, and a few days later he advised Gould his superiors would like to have such a test. In April 1954 the test was made. It revealed the well was yielding over 300 gallons a minute. In another conversation with Gould, Burd said the well was not large enough to admit defendant's pumping equipment and asked what it would cost to enlarge it from six to ten

inches. It is undisputed that Gould never furnished a figure. Instead he proceeded to ream the well to a 10-inch diameter for a depth of 250 feet. He admitted that nobody connected with the water company asked him to do so.

Later in 1954, how much later does not appear, Gould met with Burd's superiors who offered $12,000 for the well. There was no discussion about whether the offer was for title to the land or an easement. The conference was a short one because Gould asked for $100,000. About a year later defendant offered $12,000 to $13,000. It was again rejected. Some time later in 1955 or in 1956 Gould reduced his asking price to $50,000, but defendant was not interested. Finally about five years later, in 1960 or 1961, defendant offered $16,000 and Gould lowered his figure to $35,000. The negotiations ended on that note and no agreement was ever reached.

Gould conceded that no representative of defendant asked or authorized him to dig a well or to prospect for water in its behalf, or ever agreed that if he dug a well which produced water at the rate of 200 gallons a minute the company would buy it from him. It appeared also that in a pretrial deposition he said:

> "Q. What was the purpose in drilling this well (meaning the second well)? A. It was speculative on my part. For the water company.
>
> Q. You mean for the water company? A. Yes.
>
> Q. Did you drill it for the water company? A. Yes.
>
> Q. Who asked you to drill it for the water company? A. Nobody.
>
> Q. In other words, you drilled the well in anticipating that you would sell it to the water company? A. Yes.
>
> Q. That's what you were speculating on? A. Yes."

Appendix A

In August 1961 defendant acquired property on the south side of Route 202 opposite Gould's acreage and began to dig 490 feet from Gould's well. In March 1962, eight years after completion of Gould's second well, defendant's digging reached 1450 feet in depth and produced sufficient water to move defendant to obtain a permanent diversionary permit from the State Division of Water Policy and Supply to divert up to 500,000 gallons of water a day from the well. About a year later plaintiff brought this action seeking damages from the water company. He alleged that defendant had been unjustly enriched as the result of plaintiff's well-digging activity and the knowledge defendant acquired thereby that water was to be found in the immediate area to an extent which defendant, as a seller of water to the public, was interested in locating and acquiring. More specifically, plaintiff claimed that defendant had encouraged him to dig wells to locate water of the volume desired. Thus when he dug such a well, and informed defendant of the location, defendant's failure to buy it coupled with the subsequent use of the information as the incentive for acquiring nearby property and digging a sufficiently productive well of its own, unjustly enriched defendant at plaintiff's expense. Therefore, plaintiff contended, in order to do justice the law ought to impose an obligation on defendant to pay plaintiff for the expenses and losses resulting from defendant's inequitable conduct.

After consideration of the entire record, we agree with the Appellate Division that plaintiff's proof fails to establish a claim upon which relief can be granted. We concur in its declaration:

> "The evidence is uncontradicted that what the plaintiff did was not done at the request of Bernards nor with any expectation at that time that he would

> be reimbursed by Bernards for his well digging expenses. Plaintiff * * * [Gould] dug the two wells on his property on his own initiative in the hope that if he were successful in finding an adequate water supply, he would be able to negotiate for a sale of the well or an interest in his property to the water company. The fact that the drawn-out negotiations were unsuccessful because the parties did not agree on a price affords no basis for imposing a *quasi*-contractual liability on defendant, nor is such basis to be found in the fact that defendant thereafter dug its own well approximately 500 feet away to a depth almost twice that of plaintiff's well. See *Restatement*, Restitution, § 2, p. 15; § 112, p. 461; § 41, p. 162 (1937)."

In our judgment the plaintiff occupied the status of a volunteer who hoped that if his efforts produced a result which would interest defendant, an agreement to sell that result to defendant could be consummated. The fact that plaintiff knew defendant was interested generally in locating an additional water supply in the area would not transform his status from volunteer into an obligee when he found a source which defendant could use. Nor would the fact that defendant offered to buy the well at its price make it an obligor. And, although the act of negotiating to buy under the circumstances would not affect the legal relationship between them, it may be noted that no evidence was adduced to show that defendant did not act in good faith during the prolonged voluntary bargaining with plaintiff for the purchase of the well plaintiff had dug. Obviously plaintiff fixed an exorbitant price. Its sharply downward course from $100,000 to $35,000, roughly a drop of two-thirds of the original figure, over a period of *about seven*

years, particularly in light of the water company's modest upward course of $12,000 to its final offer of $16,000, leaves no other fair inference. When the negotiations broke off, it means that plaintiff's speculative venture had failed to achieve its ultimate purpose. If it is assumed that defendant had learned from plaintiff's unsolicited efforts that there was substantial underground water in the area, and to that extent was the recipient of a benefit, such enrichment should not be regarded as unjust enrichment creating a liability for plaintiff's expenses and losses simply because defendant, encouraged by plaintiff's experience, acquired nearby property, dug a well about 500 feet from that of plaintiff and more than twice as deep, and located an acceptable additional supply of water.

Accordingly the judgment of the Appellate Division is affirmed.

First Order Denying Petition for Rehearing

(Filed—September 17, 1960.)

No Justice who voted with the majority having moved a reconsideration, the petition for rehearing is denied.

WITNESS, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 17th day of September, 1968.

A TRUE COPY

JOHN H. GILDEA
Clerk

Appendix A

Second Order Denying Petition for Rehearing

(Filed—November 18, 1968.)

No Justice who voted with the majority having moved a reconsideration, the petition for rehearing is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 18th day of November, 1968.

A TRUE COPY

JOHN H. GILDEA
Clerk

APPENDIX B

Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—October 25, 1967.)

Argued October 2, 1967. Decided October 25, 1967.

Before Judges Gaulkin, Lewis and Kolovsky.

On Appeal from the Superior Court, Law Division, Somerset County.

Mr. Burtis W. Horner argued the cause for Plaintiffs-Respondents and Cross-Appellants (Messrs. Stryker, Tams & Dill, attorneys).

Mr. Sidney P. McCord, Jr., argued the cause for the Bernards Water Company, Defendant-Appellant and Cross-Respondent (Messrs. McCord, Farrell, Eynon and Munyon, attorneys).

The opinion of the court was delivered by
Kolovsky, J.A.D.

Defendant, The Bernards Water Company (Bernards), appeals from a judgment entered on a jury verdict of $12,345. Plaintiffs cross-appeal contending that the verdict was inadequate and that the trial court erred in denying their motion for a new trial as to damages. No appeal is taken from the dismissal of the action as against defendant American Water Works Service Co., Inc. (The jury's verdict was in favor of Jasper C. Gould (Jasper) alone. For some unexplained reason, judgment was entered in favor of both plaintiffs and subsequent proceedings also were taken for and against both plaintiffs.)

We do not reach the issues posed by the cross-appeal since we conclude from our examination of the record that

Appendix B

Bernards' motion for judgment of dismissal should have been granted. We find no basis for permitting plaintiffs a recovery in this case even though we accept as true, as we must (*DeRienzo* v. *Morristown Airport Corp.*, 28 N. J. 231, 236 (1958)), all the evidence which supports the view of the plaintiffs and give them the benefit of all legitimate inferences which may logically be drawn in their favor.

That evidence discloses that defendant Bernards is in the business of supplying water to consumers, its basic source of supply being a pond situate in the headwaters of the Passaic River. Plaintiffs are the owners of a five-acre tract on the northerly side of Route 202 in Bernards Township. Plaintiff Jasper is a licensed well digger.

One of Jasper's social acquaintances was Harold Burd, employed as a superintendent by Bernards. According to Jasper, Burd told him sometime in 1953 that Bernards was interested in an additional supply of water and "would I be gracious enough to show a geologist, whom he was going to bring up, * * * some of my records of wells that I drilled in that area." Burd indicated that Bernards would need a well yielding at least 200 gallons a minute. Shortly thereafter, Jasper spent two days with the geologist introduced to him by Burd, showing him the locations where he (Jasper) had drilled, "how much overburden was on top of the basic rock and the yield per minute of the wells in the area." Jasper acknowledges that, as required by applicable regulations, he reported to the "State Department of Water Policy and Supply" wells which he dug in the area over 100 feet deep and that such information is a public record.

According to Jasper, he shortly thereafter asked Burd what Bernards "would be willing to pay for 200 gallons a minute" to which Burd replied that "he wasn't the boss but he knew they'd pay a fair price."

Appendix B

In the latter part of 1953 or early in 1954, Jasper spent a little over a month drilling a well on his property to a depth of about 365 feet. Its yield was about 60 gallons a minute,

> "so I abandoned that, and a few months later I moved the machine over to another location about 80 feet further in on my property and drilled a well there, and I had built at the time a shop on the property 30 feet square for a work shop and I had the bulldozer level out a piece of ground for the construction of a home, and I drilled this well thinking if it didn't yield well I would use it on my home but when it proved to be as it did then I relocated my house on the property at another site so that we could negotiate for the sale of this well. I have five acres. I put my house back in the center of the property rather than where I originally planned."

The second well, six inches in diameter, was 670 feet deep and yielded over 200 gallons per minute.

Jasper admits that the wells were dug on his own initiative, that neither Burd nor the geologist introduced by him nor any other representative of Bernards had theretofore asked him to drill a well for the company, or to find water for it or had offered to buy an additional water supply from him.

In Jasper's own words, he was "speculating" that if he dug a well yielding 200 gallons per minute he would be able to sell it to the water company.

In April 1954, Jasper met Burd on one of their periodic visits to a bowling alley and told Burd "that I felt I had a very good well and was his company interested in seeing the pump test on that well." Burd reported back that his

superiors would like to have a pump test made. On April 20, 1954, a pump test was made indicating a yield of 318 gallons per minute. When Burd indicated that the well was not large enough to accept the pumping equipment which Bernards would want to install, plaintiff proceeded to ream the well to increase its diameter from six inches to ten inches for a depth of 250 feet.

Thereafter, Jasper met with a Mr. Coleman, one of Burd's superiors, who offered $12,000 for the well, an offer which Jasper immediately rejected saying that he wanted $100,000. The parties did not discuss whether Bernards was to get only an easement to the well or whether it had to purchase the land.

In 1955, Coleman and another representative of Bernards again offered $12,000 for the well, indicating that the company might go to $13,000. During another conversation in "1955 or 1956," Jasper reduced his asking price from $100,000 to $50,000.

In February 1960, there was another conference between Jasper and three representatives of Bernards—Greco, its president, Coleman and a third man. Jasper testified that Greco "offered me $16,000 for it and I offered to sell for $35,000."

There were no further conversations with respect to the sale of the well or the property.

In August 1961, Bernards acquired property on the south side of Route 202 and began to drill a well at a point which Jasper says is 490 feet from his second well. By March 1962, the drilling of the Bernards well had been completed to a depth of 1450 feet.

The complaint in this action, filed on February 14, 1963 is in four counts. In the first count, plaintiffs husband

and wife, as owners of the five-acre tract, charged that defendants appropriated $45,000 worth of water out of valuable reservoir on plaintiffs' lands. The second count charges that the conversion was malicious warranting recovery of punitive damages.

The third and fourth counts, by the husband Jasper alone, charge that defendants requested him to make geographical surveys on his property for the purpose of locating a water supply; that pursuant to the request, plaintiff dug two wells at a total cost of $15,000 and that

> "As a direct result of plaintiff's efforts, a water supply was discovered which defendants appropriated and converted to its own business and commercial use by trespassing on the lands of the plaintiff.
>
> "The benefits accrued to the defendants by reason of plaintiff's labor and material represent an unjust enrichment of the defendants at the cost and expense of the plaintiff and defendants are under a duty to make restitution to the plaintiff for the value of the benefit received."

The third count sought compensatory damages; the fourth, punitive damages. The contentions were repeated in the pretrial order.

During the trial, the court dismissed the first and second counts charging conversion as well as the fourth count seeking punitive damages. No appeal is taken from those rulings. Defendant Bernards' motion for dismissal of the third count was denied and the case submitted to the jury.

Appendix B

It was, of course, for the jury to determine whether plaintiffs' version of the facts were true. However, it was not the jury's function to determine whether those facts gave rise to the *quasi*-contractual obligation contended for by plaintiffs. That determination was for the court; it should not have been submitted to the jury.

We find no basis for imposing *quasi*-contractual liability upon Bernards. Nothing in the evidence supports a determination that Bernards has been "unjustly enriched at the expense" of plaintiffs and that the circumstances are such that the law should impose an obligation "for the purpose of bringing about justice without reference to the intention of the parties." *St. Paul Fire, etc. Co.* v. *Indemnity Ins. Co. of No. America*, 32 N. J. 17, 22 (1960); *Restatement, Restitution*, §1, p. 12 (1937).

Plaintiffs argue on appeal that "as a result of various test wells drilled and other services performed at the request of Bernards, plaintiffs conferred upon Bernards a valuable benefit; namely, the revelation of a source of water ideally suited for commercial utilization by the water company."

The evidence is uncontradicted that what plaintiff did was not done at the request of Bernards nor with any expectation at that time that he would be reimbursed by Bernards for his well-drilling expenses. Plaintiff Jasper dug the two wells on his property at his own initiative in the hope that if he were successful in finding an adequate water supply, he would be able to negotiate a sale of the well or an interest in his property to the water company. The fact that the drawn-out negotiations were unsuccessful because the parties did not agree on a price affords no basis for imposing a *quasi*-contractual liability on defendant, nor is such basis to be found in the fact

that defendant thereafter dug its own well approximately 500 feet away and to a depth almost twice that of plaintiff's well. See *Restatement, Restitution,* §2, p. 15; §112, p. 461; §41, p. 162 (1937).

The judgment is reversed with directions that judgment be entered in favor of defendant The Bernards Water Company.

Mandate on Reversal

(Filed—October 25, 1967)

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Law Division, Somerset County is reversed with costs; and that the record be remitted to the Superior Court, Law Division, Somerset County to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

Witness the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division.

Mortimer G. Newman, Jr.,
Clerk of the Superior Court.

APPENDIX C

Documents of Department of Conservation and Economic Development, Division of Water Policy and Supply State of New Jersey

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Permit to Drill Well

STATE OF NEW JERSEY
DEPARTMENT OF CONSERVATION & ECONOMIC DEVELOPMENT
DIVISION OF WATER POLICY AND SUPPLY
520 EAST STATE STREET
TRENTON 25, N. J.

Owner: Bernards Water Co.

Address: Bernardsville, N. J.

Driller: Wm. Stothoff Co., Inc.

Address: Flemington, N. J.

In compliance with R.S. 58:4A-14, permit is hereby issued to drill a well in Bernards Twp., Somerset. Use of Well: Test. Diameter of Well: 8 inches. Proposed Depth of Well: 1000 Feet. Proposed Capacity of Pump: G.P.M. Method of Drilling: Cable tool.

THE BERNARDS WATER CO.
J. J. GARLAND
J. J. Garland, Vice Pres.

August 14, 1961

Appendix C

In accepting a permit for this well, the Owner agrees to abide by the following terms and conditions:

1. The issuance of a permit to drill this well conveys no rights, either expressed or implied, to divert water.

2. If the pump capacity applied for is less than 70 gpm, no subsequent increase to 70 gpm or more shall be made without prior approval of the Division.

3. In the event this well is abandoned, the Owner will assume full responsibility for plugging or sealing it in the manner satisfactory to the Division, in accordance with provisions of R.S. 58:4A-4.1.

4. A permit to drill this well will be valid for one year from date of approval.

CERTIFIED A TRUE COPY

MARTHA H. BRENNA, Secretary
Water Policy and Supply Council
January 10, 1969

Samples of cuttings required every 10 feet

[WELL PERMIT APPROVAL STAMP]

August 25, 1961
32 E. Hanover St.
Trenton, N. J.

Appendix C

BERNARDS WATER COMPANY
Bernardsville, New Jersey

Attention: Mr. J. J. Garland, Vice-President

Gentlemen:

Enclosed is drilling permit No. 25-10,173 for a well 8 inches in diameter, 1000 feet deep, to be drilled by Wm. Stothoff Co., Inc., and to be located approximately one mile northeast of the intersection of Route 202 and Route 525 (Anderson Road) on east side of Route 202 in Bernardsville, Somerset County, as a test well.

This permit is issued with the understanding that no water is to be diverted from the proposed well, except for test purposes, until approval is granted by the Water Policy and Supply Council for diversion at this location.

Please forward the permit and attached well record blanks to your driller and advise this office of the results of the test.

Very truly yours,

RAYMOND A. WEBSTER
Supervising Engineer

RAW:aa
Encl.

CERTIFIED A TRUE COPY
MARTHA H. BRENNA
Martha H. Brenna, Secretary
Water Policy and Supply Council

January 10, 1969

Appendix C

Approval of Application of Bernards Water Company Bernardsville, New Jersey

Water Supply Application No. 1183

STATE OF NEW JERSEY
DEPARTMENT OF CONSERVATION & ECONOMIC DEVELOPMENT
DIVISION OF WATER POLICY AND SUPPLY

for an additional water supply from a proposed rock well in Bernards Township, Somerset County, New Jersey.

Approved October 29, 1965

In compliance with the provisions of Title 58, Capter 1, of the Revised Statutes, and Chapter 448, Laws of 1948, the Bernards Water Company, filed with the Division of Water Policy and Supply of New Jersey on March 10, 1964, an application for approval of plans for diverting a maximum of 500,000 gallons daily for the purpose of obtaining an additional source of water supply from a proposed rock well 1,450 feet deep, the point of the proposed diversion being located on the south side of U. S. Route 202, about 3,000 feet northeast of the Bernardsville Borough line in Bernards Township, Somerset County, for the purpose of supplying water to the Borough of Bernardsville and portions of Bernards Township, including Basking Ridge, Lyons, Liberty Corner, and the U. S. Veterans Hospital, all in Somerset County.

The following supplmentary papers were filed with the application and made a part thereof:

1. General data regarding water supply system.

Appendix C

2. Map showing the information required by the Division of Water Policy and Supply.

The Water Policy and Supply Council directed that a public hearing on said application be held in Trenton, New Jersey on June 15, 1964. Notice of this hearing was advertised in accordance with the orders of the Council, and proofs of this advertising were filed.

In accordance with the notice as above set forth, the Water Policy and Supply Council held a public hearing on said application in Trenton, New Jersey on June 15, 1964 and adjourned hearing on October 4, 1965 at which all persons, corporations, municipal corporations and other civil divisions of the State affected by the proposed plans who desired to be heard were heard.

The Council having examined the said plans, and having considered the testimony and argument presented at the hearings does hereby decide that the plans proposed by the Bernards Water Company for the diversion of an additional water supply from a proposed rock well as set forth in the application and the testimony presented at said hearings are justified by public necessity, that they provide for the proper and safe construction of all work connected therewith, that they provide for the proper protection of the supply from contamination, and that such plans are just and equitable to the other municipalities and civil divisions of the State affected thereby and to the inhabitants thereof.

The Water Policy and Supply Council does therefore approve the application of the Bernards Water Company and hereby consents to the diversion of water from a proposed rock well as proposed therein subject, however, to the following limitations, terms and conditions:

Appendix C

1. The applicant shall pay to the State such annual charge for the diversion of water as is now made or may hereafter be authorized by law. Said applicant shall keep accurate records by meter or other approved method of the amount of water diverted and shall report the same quarter-yearly to the Division of Water Policy and Supply, as required by law.

2. The amount of water which shall be diverted under this approval from a well approximately 1450 feet deep shall not exceed an average of 500,000 gallons daily during any month, provided, however, that total diversion from existing surface source and that herein approved shall not exceed an average of 2,120,000 gallons daily during any month.

3. The territory to be supplied under this approval shall be the Borough of Bernardsville and portions of Bernards Township, including Basking Ridge, Lyons, Liberty Corner, and the U. S. Veterans Hospital, all in Somerset County.

* * *

5. If the applicant shall at any time abandon this source of supply, all rights and privileges conveyed by this approval shall revert to the State, it being distinctly understood and agreed that the permission herein contained to divert water is given to the applicant alone and shall not be assigned or set over to any corporation or person without the consent of this Council.

6. The approval of the application herein and all rights covered thereby or arising by reason thereof are granted and accepted upon the express condition that no monetary value shall be claimed or allowed for the diversion rights

and privileges herein granted and conveyed, in the event that the State of New Jersey or any board, body or commission, or municipality thereof, having authority to acquire and/or consolidate existing public water supplies, or to exercise any like power, shall acquire or attempt to acquire the property of the grantee.

7. This approval shall not be construed to empower or permit the applicant to use any of the waters mentioned in the application for which it shall not have first obtained the permission of the State Board of Health.

8. This approval shall be subject to the provisions that, in the event the territory proposed to be supplied under this approval be subdivided by act of the Legislature, the Council may, upon petition and after hearing, allocate the waters herein allowed to be diverted, to the several portions of the territory in such proportion as, in its judgment, is equitable.

9. The water supply system herein approved shall not be operated until the work has been approved by the Council, except that a temporary use of part of the constructed works may, upon request, be authorized by the Council.

10. The proposed well shall be metered and the total diversion each month therefrom shall be reported separately to the Division.

11. The proposed well shall be equipped with an air line and gage to measure water levels under all conditions.

12. This approval may be reviewed at any time.

Appendix C

13. All services shall be metered; meters shall be maintained and read in a manner satisfactory to the Division; water delivered to consumers shall be billed at metered rates.

14. Whenever the Northeast Well is being used, the Water Company will carefully control and adjust the pumping rate so that the static water level in the existing well on the property now owned by Mr. and Mrs. Cyril Murphy will not be reduced below a level of 42 feet from the top of the casing of such well. When the said Northeast Well is being used by the Company, the Company will, at periodic intervals, and upon advice to the occupants of the home now occupied by Mr. and Mrs. Murphy, measure the static water level in the aforesaid well on the property now owned by Mr. and Mrs. Murphy, for the purpose of so controlling and adjusting the pumping rate as aforesaid.

15. This approval shall not become operative unless and until the applicant shall file with the Council within ninety days from date hereof its written acceptance of the terms and conditions hereby imposed.

In the event that any conditions hereby imposed are violated and such violation shall be established to the satisfaction of this Council, this approval may thereby be abrogated upon the passage by this Council of a resolution to that effect.

In Testimony Whereof, the Water Policy and Supply Council has directed that this instrument be excuted by the Director of the Division and that the official seal be affixed hereto and attested by the Secretary in accordance with a

resolution adopted by the twenty ninth day of October, one thousand nine hundred sixty five, at Trenton, New Jersey.

By order of

WATER POLICY AND SUPPLY COUNCIL
ROBERT L. HARDMAN
Robert L. Hardman
Acting Director

Martha H. Brenna, Secretary
MARTHA H. BRENNA
Water Policy and Supply Council
January 10, 1969

L. S.

Attest:

MARTHA H. BRENNA
Martha H. Brenna
Secretary

December 31, 1965